



Community Design Case-Law

2021

PROGRAMME

45'
Presentation

Visibility

Functional shapes & modular systems

Individual character

Priority claims

15'
Questions and answers



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1

Visibility

BoA, 23/08/2021, R 299/2021-3, Vaccum cleaner bag



BoA, 23/08/2021, R 299/2021-3, Vaccum cleaner bag

Art. 3(c) CDR: "complex product" means a product which is composed of multiple components which can be replaced **permitting disassembly and re-assembly of the product**. [constituent part?]

Art. 4(2) CDR: a design applied to in a **product which constitutes a component part of a complex product** shall only be considered to be new and to have individual character (a) if the component part, once it has been incorporated into the complex product, remains visible during normal use of the latter.

Art. 4(3) CDR: "Normal use" within the meaning of paragraph (2)(a) shall mean use by the end user, excluding **maintenance, servicing or repair work**.

BoA, 23/08/2021, R 299/2021-3, Vaccum cleaner bag

Guidelines: Article 4(2) CDR does not require a component part to be clearly visible in its entirety at every moment of use of the complex product. **It is sufficient if the whole of the component can be seen some of the time** in such a way **that all its essential features can be apprehended** (22/10/2009, R 690/2007-3, Chaff cutters, § 21).

BoA, 23/08/2021, R 299/2021-3, Vacuum cleaner bag

Cancellation Division: a vacuum cleaner is a complex product consisting of a large number of components that **could be replaced**. Vacuum cleaner bags were **consumables**. Such as batteries, light bulbs or water filters, they were necessary for the functioning of a complex product and had to be replaced from time to time. Although not all the consumables were components, it followed from the fact that a vacuum cleaner bag was designed in such a way that it fitted into one (or more) particular vacuum cleaner that it was a component of the complex product of a vacuum cleaner

The vacuum cleaner is open for insertion of the bag and is closed again after the pouch has been inserted, so that the vacuum cleaner bag is not visible during normal use of the vacuum cleaner

BoA, 23/08/2021, R 299/2021-3, Vacuum cleaner bag

A vacuum cleaner **is undoubtedly a complex product**. Vacuum cleaners are offered on the market in various kinds, namely with and without vacuum cleaner bags (§ 26)

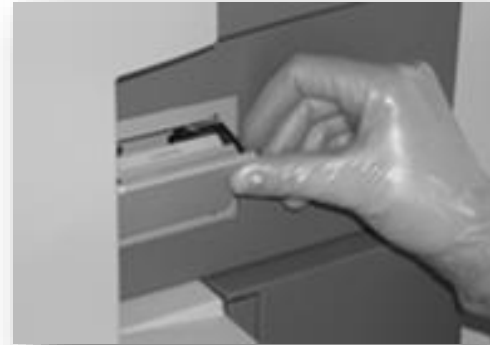
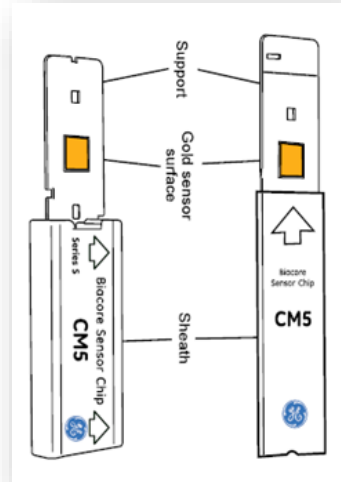
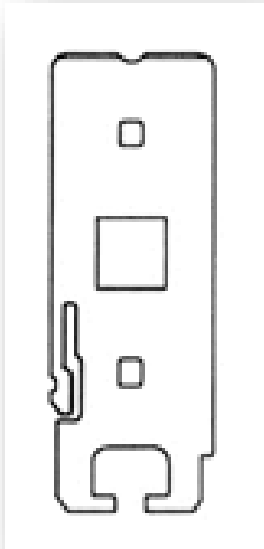
A vacuum cleaner bag does not constitute a component of the complex product vacuum cleaner within the meaning of Article 4(2) CDR. Vacuum cleaner bags are **not used for repairing, servicing or maintenance of a vacuum cleaner** (§ 27)

Although the intended use of a vacuum cleaner requires a vacuum cleaner bag, this is not perceived as a component (§ 28)

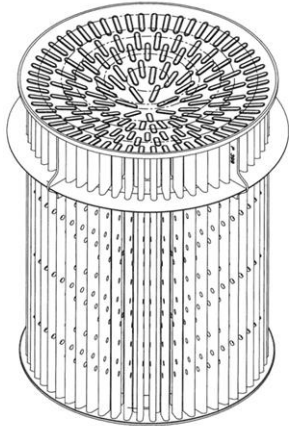
Vacuum cleaner bags are consumables that may already be attached to vacuum cleaners upon purchase, but **can be purchased independently**

A full vacuum cleaner bag is disposed of and not re-used

BoA, 09/04/2014 R2337/2012-3 – Sensor chip



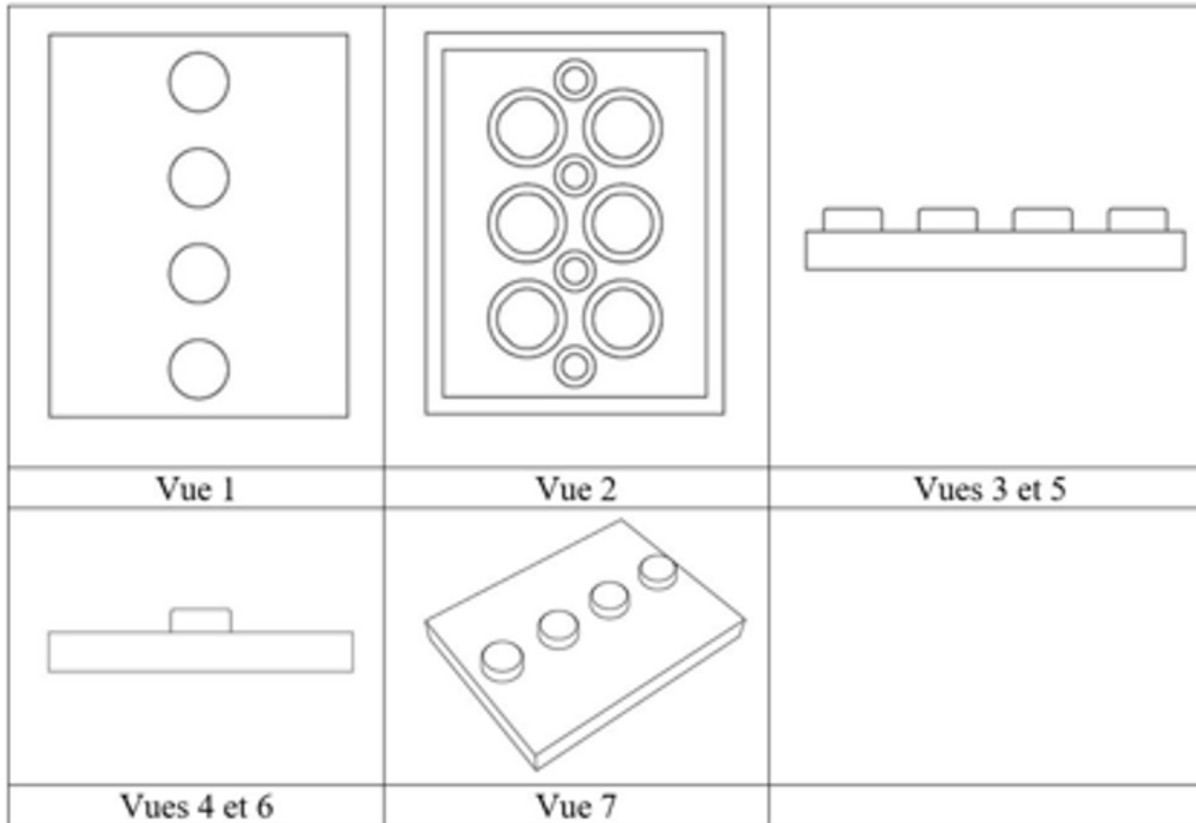
General Court, 20/01/2015 ,T-606/13 - Exchanger inserts



2

Functional shapes & Modular systems

General Court, 24/03/2021, T-515/19, Toy building set



General Court, 24/03/2021, T-515/19, Toy building set

Art. 8(1) [functionality], 8(2) [« must fit », interconnections] & 8(3) [« Lego clause », modular systems]

Cancellation Division - dismissed the request for invalidity:

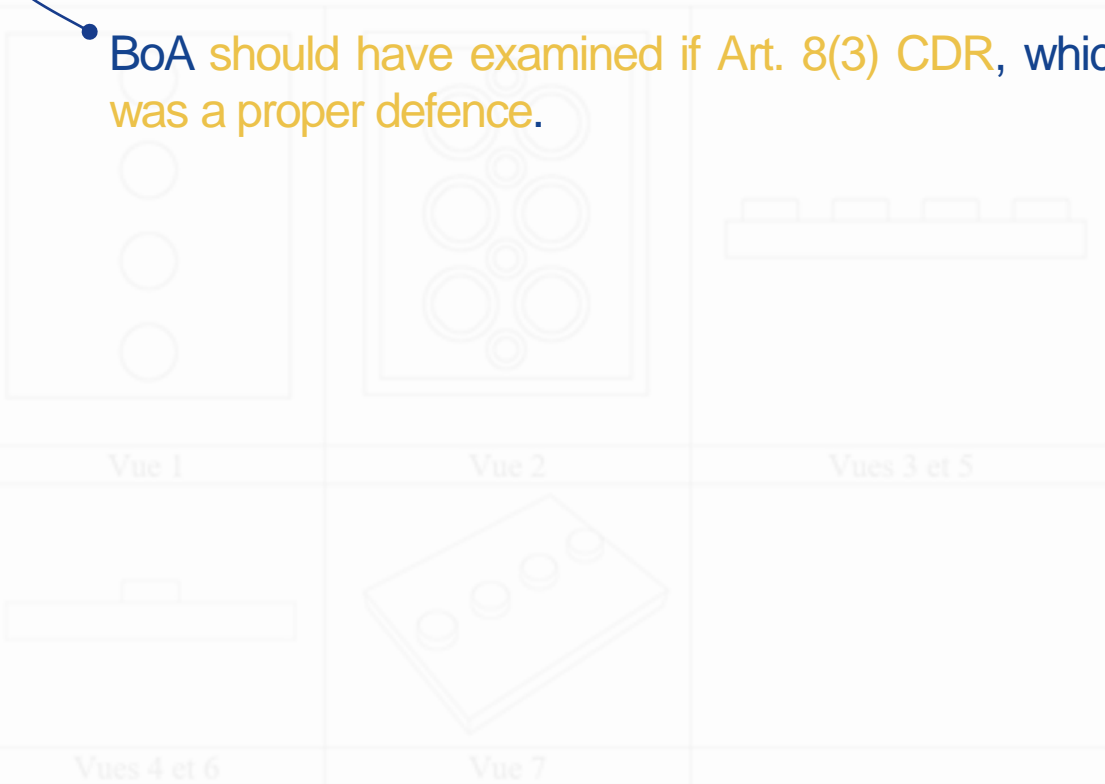
The product **is a modular system** and there is **no reason for annulling the design on account of interoperability**

BoA – annuls:

The design is functional (**Art. 8(1) RDMC**) without examining whether **Art. 8(3) is derogation to Art. 8(1)**.

General Court, 24/03/2021, T-515/19, Toy building set

BoA should have examined if Art. 8(3) CDR, which had been relied on before BoA, was a proper defence.



General Court, 24/03/2021, T-515/19, Toy building set

BoA should have examined if Art. 8(3) CDR, which had been relied on before BoA, was a proper defence.

(47) Nothing prevents an RCD holder from raising a defence based on Art. 8(3) CDR for the first time on appeal.

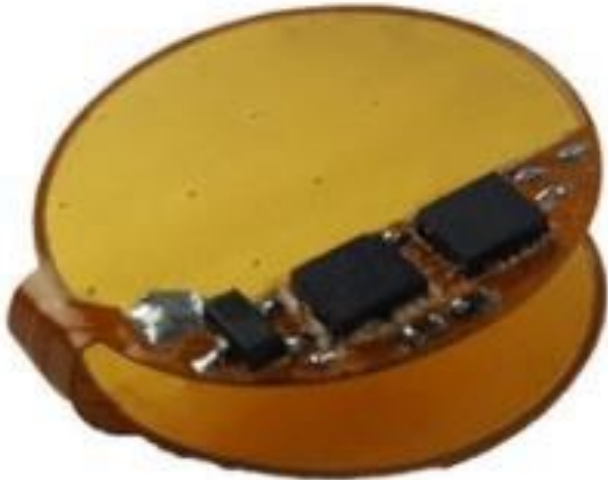
(61-71) Given the overlap between Art. 8(1) & Art. 8(2) CDR, Art. 8(3) is an exception applying to both grounds of functionality and interconnection.

(80) EUIPO must examine if the design may benefit from the derogation applicable to modular systems including where the request for invalidity was not based on Art. 8(2) CDR.

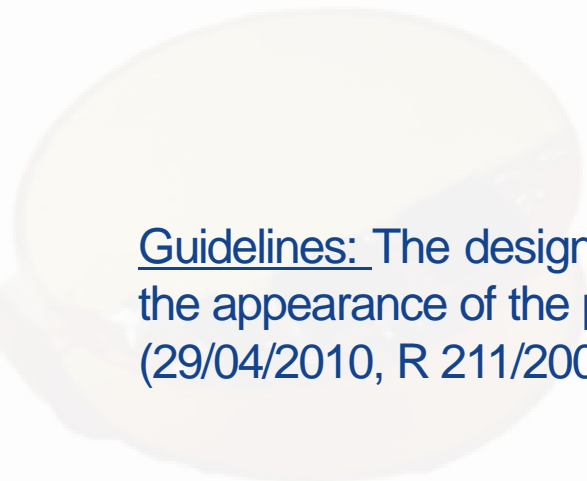
(96) **If at least one of the features** of appearance of the product covered by a contested design is not solely dictated by the technical function of that product, the design cannot be declared invalid under Article 8(1) CDR.

(105) (...) the smooth surface of the upper face of the product concerned by the contested design is not included among the features identified by the Board of Appeal. It is a feature of appearance of that product

BoA, 05/07/2021, R 1070/2020-3, Accessory for remote controls



BoA, 05/07/2021, R 1070/2020-3, Accessory for remote controls



Guidelines: The design as a whole will be invalid only if **all the essential features** of the appearance of the product in question were solely dictated by its technical function (29/04/2010, R 211/2008-3, FLUID DISTRIBUTION EQUIPMENT, § 36).

BoA, 05/07/2021, R 1070/2020-3, Accessory for remote controls

Cancellation Division: Art. 8(1) [functionality]: As the device is only an accessory and not an integral part of the car key controller, and therefore has its own market, it cannot be ruled out that, for example, **the colour is not determined solely by function but was chosen to make the product more attractive**. Although the invalidity applicant mentions the need for the items to be yellow/gold because of their conductivity, it does not provide any evidence in this regard.

A Community design will be declared invalid if **all its essential features** are dictated solely by technical function. In the present case, it was not proved by sufficiently solid evidence that **all the features of the design (such as colour)** had been chosen solely to secure or enhance the product's technical function.

BoA, 05/07/2021, R 1070/2020-3, Accessory for remote controls

- Article 8(1) CDR therefore requires an assessment as to whether, in view of the function of the product to which the design is to be applied, **all its features of appearance** are the result of technical considerations only' (§ 24)

BoA did not treat the colours as features independent from the plates: 'The brown colour is the colour of the flame-resistant material used (FR4 material) and the yellow-gold colour is the gold plating of copper conductive parts which protects copper from oxidization process (corrosion) and further ensures better conductivity'. Reference to the copper and gold colour of the plates is further made in the utility model, § 29).

BoA thus held that colours themselves could not be an element playing in favour of ornamental considerations.


BoA, 05/07/2021, R 1070/2020-3, Accessory for remote controls

- It follows that **all the features** of the contested RCD **and the arrangement thereof** are solely dictated by technical function and are necessary for the technical solution of the product on how to enable the electric power supply to be cut off when not in use. The specific arrangement of these features is equally dictated by considerations related exclusively to the need to fulfil the technical function of the product concerned (§ 32)

The design holder did not provide any information regarding under which aesthetic considerations the features of appearance were chosen (§ 34)


3 Individuel character

General Court, 20/10/2021 T 823/19 Spiralling plastic band


Close-up look for thick telephone coil rubber band

Price: \$1.50/pair



More colours of telephone coil

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GLOBAL, NOVEMBER 1, 2020

SWIRLIDO OR SWIRLIDON'T?

A few months ago I contacted Lindo, makers of the Lindo *Twist-n-Roll* Tweezers, about obtaining their product for review ([click here for my full review of the Twist-n-Roll Tweezers](#)). After I wrote that review, the folks at Lindo asked me if I'd like to receive another one of their beauty products for review, and that is when I first became acquainted with *Swirlido Mac Tin*.

When I received the samples, I have to admit that my first thought was, "These look like little telephone cords!" But the fun colors and the idea of using something other than my usual ponytail holders made me want to seriously give these a try.

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General Court, 20/10/2021 T 823/19 Spiralling plastic band

- **Reliability of time-stamped information** such as internet users' comments in two blogs dedicated to the field at issue (beauty accessories) (34-35 & 37);

Evidential value of the **internet disclosure supported by other screenshots and search engine results** (36);

The **mere theoretical possibility to manipulate information on Internet does not allow dismissing the evidential value** of the evidence of disclosure, unless positive evidence of concrete tampering is submitted (49);

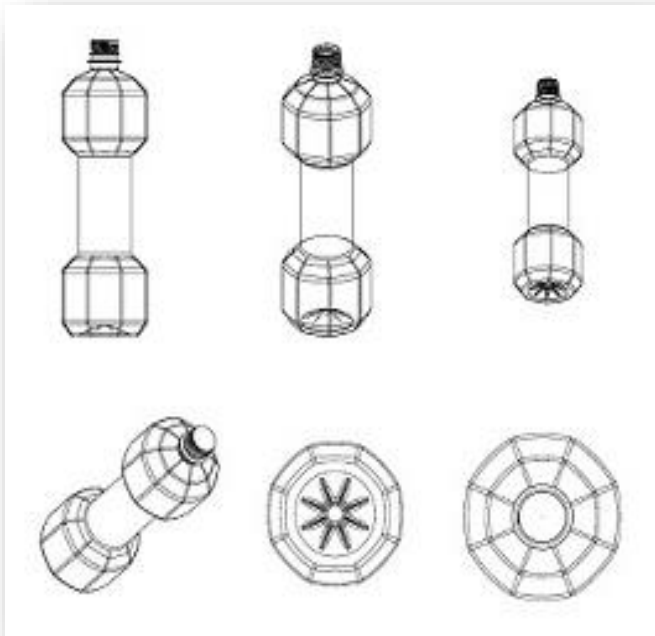
Wayback machine extracts can corroborate other evidence even if the earlier design isn't represented if the page contains text which is the same as in the original page (58)

Convergence Programme (CP) 10 - Criteria for assessing disclosure of designs on the Internet



https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/News/cp10/CP10_en.pdf

General Court, 21/04/2021, T-326/20, Beverage bottles



General Court, 21/04/2021, T-326/20, Beverage bottles

Even if it were established that, at the date of its registration, the shape resembling the structure of a dumbbell applied to a beverage bottle would have been entirely new in the industrial sector concerned, the uniqueness of such a shape does not confer on the prior design broader protection than that which it enjoys under the CDR (40) ;

the individual character of a design required for its registration applies to the contested design in relation to the prior design, without the allegedly unprecedented character or originality of its appearance having any influence whatsoever on the assessment of the individual character of the contested design (40)

Even without a label, the designs have significant differences (§ 66-70)

The contested design and the prior design produce different overall impressions on the informed user (§ 71).

General Court, 22/09/2021, T-503/20, Signalling apparatus

Contested RCD



Earlier RCD



Earlier RCD cancelled for lack of individual character

General Court, 22/09/2021, T-503/20, Signalling apparatus

An RCD can be annulled for lack of individual character even on the basis of an **earlier RCD which had been annulled** for the same reason (reason: distinction between art 25(1)(b) and (d) CDR); a request for invalidity based on a cancelled earlier design is therefore admissible (26-30)

Including for technical products, the informed user is neither an average consumer nor an expert having a very high degree of attentiveness because design right protects the appearance rather than technical features (53-55); the informed user's attention can therefore not focus on technical aspects of the designs (55)

Only visible features are relevant, thus the lateral and rear sides of the compared designs must be ignored, as well as interior parts (56-57)

General Court, 22/09/2021, T-503/20, Signalling apparatus

The degree of freedom is only a mitigating factor, **not an autonomous parameter** which would determine the required distance vis-à-vis the prior art (61);

In this case, standardization may apply to dimensions but not to the configuration of features such of the division of the monitor in six panels (68-70);

An international standard which only sets out **recommendation** is not conclusive of a limited degree of freedom (74-75); technical requirements such as the easy readability of information may not dictate the shape of the configuration of features (77);

The existence of alternative shapes proves the contrary (77)

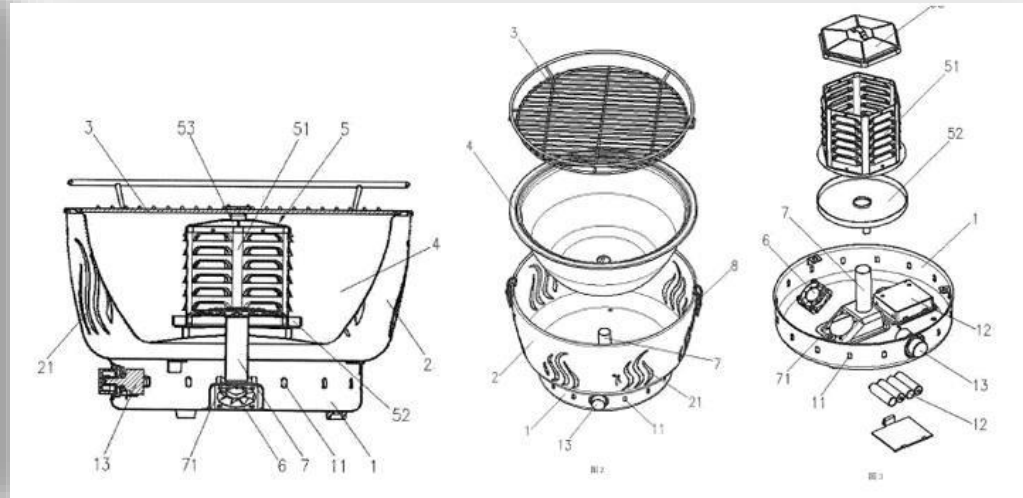
General Court, 22/09/2021, T-503/20, Signalling apparatus

The similarities between the designs are not resulting from standardization (87);

The affixing of different trade marks is irrelevant since design law does not protect the unicity of origin (93);

The fact that **competitors use similar designs** does not make minor difference more striking, even more so when the tendency is limited to one Member State (97)

Board of Appeal, 04/10/2021, R 1651/2020-3, Grilling apparatus (Art.7(2) CDR)



Chinese utility model No CN 204 410 600

Published on 24/06/2015 – within 12-month grace period

3

Priority claims

General Court, 14/04/2021, T-579/19, Gym articles

Priority can be claimed **in respect of ‘utility models’**

Since the filing of an application for a utility model (or a PCT application which could concern a utility model) gives rise to a 12-month priority period for filing a subsequent application for a utility model, the same 12-month period applies when claiming priority in respect of a subsequent design

The logic inherent in the priority system that **the duration of the priority period is generally determined by the nature of the prior right** (§ 77-80).

General Court, 14/04/2021, T-579/19, Gym articles

Art 41(1) CDR: A person who has duly filed an application for a design right or for a **utility model** (...) shall enjoy, for the purpose of filing an application for a registered Community design in respect of the same design or utility model, a right of priority of six months from the date of filing of the first application

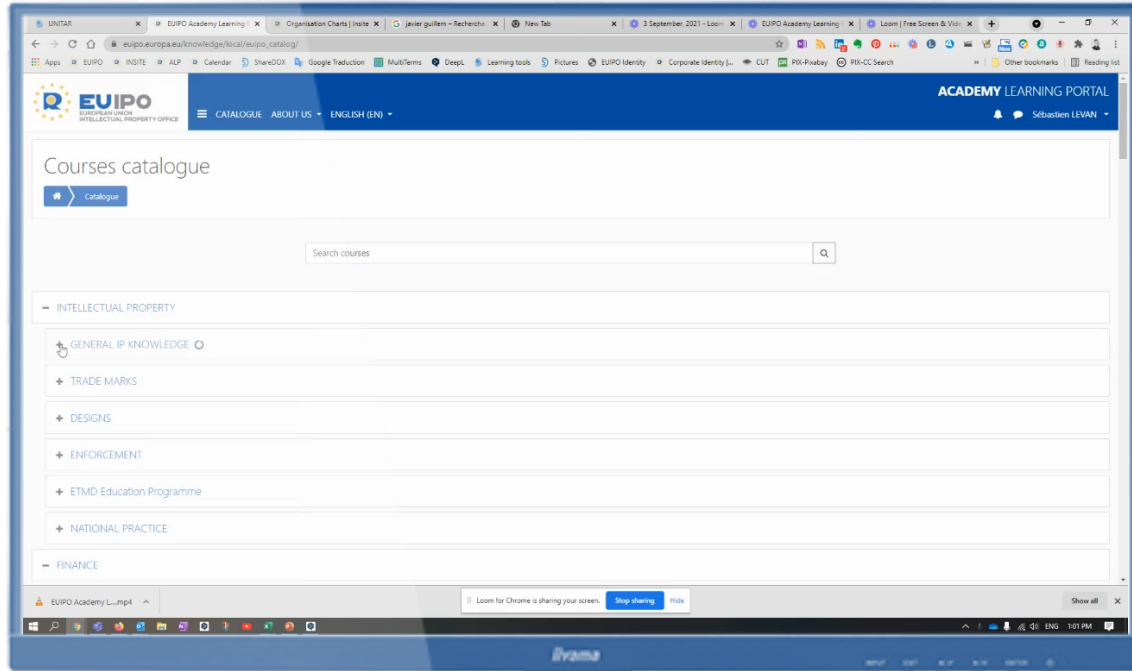
Art. 4(E)(1) Paris Convention: Where an industrial design is filed in a country by virtue of a right of priority based on the filing of a **utility model**, the period of priority shall be the same as that fixed for industrial designs

General Court, 14/04/2021, T-579/19, Gym articles

Art 4(3) PCT: **Unless** the applicant asks for any of the other kinds of protection referred to in Article 43, designation shall mean that the desired protection consists of the grant of a **patent** by or for the designated State.

Art 43 PCT: In respect of any designated or elected State whose law provides for the grant of (...) utility models (...), the applicant may indicate that his international application is for the grant, as far as that State is concerned, of (...) a **utility model, rather than a patent** (...), and the ensuing effect shall be governed by the applicant's choice.

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